Filed 6/26/09 K.K. v. Superior Court CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

K.K., Petitioner, v. THE SUPERIOR COURT OF ORANGE COUNTY, Respondent; ORANGE COUNTY SOCIAL SERVICES AGENCY et al., Real Parties In Interest.	G041959 (Super. Ct. No. DP014099) O P I N I O N

Original proceedings; petition for a writ of mandate/prohibition to challenge an order of the Superior Court of Orange County, Douglas Hatchimonji, Judge. Petition denied.

Juvenile Defenders and Lawrence A. Aufill for Petitioner.

Nicholas S. Chrisos, County Counsel, Karen L. Christensen and Jeannie Su, Deputy County Counsel, for Real Parties in Interest.

Petitioner K.K. (Mother) challenges the juvenile court's order denying reunification services and scheduling a permanency hearing pursuant to Welfare and Institutions Code section 366.26[1] with respect to her son, M.K. We conclude the petition lacks merit and deny it.

FACTS

A petition filed on January 13, 2009, alleged almost three-year-old M.K. came within section 300, subdivision (b), due to his parents' failure to protect. Mother, M.K.'s father, T.K. (Father)[2] and M.K., were in a car accident while Mother was driving and both parents were under the influence of multiple prescription medicines and marijuana. The parents both had significant histories of substance abuse and numerous prior arrests for driving under the influence. M.K. had already been the subject of a dependency proceeding for the same reasons. He was declared a dependent child in September 2006 and removed from parental custody. The parents successfully participated in services, including substance abuse treatment programs, and regained custody of M.K. The prior dependency was terminated in March 2008.

Facts Surrounding Prior Dependency Proceeding

In September 2006, then seven-month-old M.K. was taken into protective custody. Mother's history of substance abuse dated to age 15, and included use of methamphetamine, cocaine, marijuana, alcohol, and prescription drugs Vicodin, Soma, and Xanax. Father also had a history of substance abuse dating to age 13, including marijuana, alcohol, Vicodin, Soma, and Xanax. In November 2005, Father was arrested for driving under the influence. In June 2006, Mother was driving while under the influence of Soma and marijuana, and hit a police patrol car. At the time, Father was passed out in the backseat of the car. In July 2006, Father was stopped and arrested for

[1] All further statutory references are to the Welfare and Institutions Code, unless otherwise indicated.

[2] Father does not challenge the referral order, and, accordingly we do not set forth all the facts as to him.

driving while under the influence. He had 70 Vicodin pills in the car and no prescription for them. Shortly after getting out of jail, Father was in another accident while driving under the influence—this time, Mother was passed out in the backseat and had to be taken to the hospital for detoxification and treatment.

At the end of July 2006, Mother agreed to voluntary family services, but she continued to abuse prescription and illegal substances. In September 2006, Mother was found intoxicated and passed out while M.K. was in her care. M.K. was taken out of parental custody and declared a dependent child. The parents received reunification services for a year and then received family maintenance services until March 2008. The parents satisfactorily completed services, which included counseling, substance abuse treatment, drug testing, parenting classes, and attending Alcoholics Anonymous (AA) and Narcotics Anonymous (NA) meetings. M.K. was returned to their custody, and the dependency proceeding was terminated.

Current Events/Detention

On January 10, 2009, Mother was driving a car while under the influence of Vicodin, Soma, Xanax, and marijuana. Father was in the car, and M.K. was in the backseat. Mother veered off the road and struck a tree. The car's airbags deployed. M.K. was tossed about in the car—he was either not secured or improperly secured in his car seat—and he was injured. Mother was also injured—loosing her front tooth in the accident. The police officer responding to the accident stated Mother appeared to be intoxicated, she admitted she had taken Vicodin, and could not recall if she had also taken Soma. Father also appeared "'loaded' on pain medications or muscle relaxants as well." The officer could not conduct a field sobriety test on Mother as she was receiving medical treatment.

An Orange County Social Services Agency (SSA) social worker interviewed both parents at the hospital. Mother had significant injuries from the accident. Mother said she had reached over to get something when the car crashed.

Mother said she had been taking Vicodin and Xanax for "social anxiety." She could not recall when she had taken Soma. Mother admitted she used marijuana with a friend earlier in the day, and could not recall where M.K. had been. When asked why she would be using marijuana when she had successfully completed a perinatal program in the last dependency case, Mother replied only, "'Good question.'" Mother stated Father had a prescription for daily marijuana use for social anxiety, but could not recall the name of their physician. Mother checked herself out of the hospital, against medical advice, before a toxicology screen could be run on her.

Father denied using drugs when the accident occurred but refused to take a blood test. He claimed Mother had been looking for her cell phone and lost control of the car. Father stated he and Mother both had prescriptions for Norco, Soma, Xanax, and for daily marijuana use for "social anxiety" but could not recall the name of the prescribing doctor. When told Mother had admitted using marijuana but had not mentioned having a prescription for marijuana, Father replied, "'then I'll get her one.'"

The social worker reported the paternal grandfather, to whom M.K. had been released after the accident, said both parents had been sober for a while but had begun abusing prescription medicines again. He scoffed at the notion either needed prescription medicine for social anxiety saying "both have always been very popular and never had any issues being social." The juvenile court ordered M.K. detained and set a jurisdictional hearing for February 5, 2009.

Jurisdiction

In its first report for the jurisdictional hearing, SSA recommended no reunification services to the parents pursuant to section 361.5, subdivision (b)(13) (services need not be provided if the parent has a history of chronic abuse of drugs or alcohol and has resisted prior court-ordered treatment). The parents had been referred to services including counseling, parenting education, and drug testing. Mother missed

some drug tests. The parents were having visits several times a week and the visits went well.

When interviewed in late January, Mother claimed the car accident occurred when a baby bottle rolled under the driver's seat and became lodged under the brake pedal so she could not stop the car. Mother claimed the labels on her prescription medicine bottles only said she should take care while driving. Mother said she had prescriptions for Soma, a muscle relaxer, and Norco, a pain-killer, both of which she took due to pain from a recent dune buggy accident. She took Xanax for social anxiety. Mother said she had a prescription for marijuana too but could not locate it. Father also stated he could not find his marijuana prescription.

On January 29, the social worker received the parents' medical records from Dr. Elzik (a psychiatrist) who prescribed to both Mother and Father the drugs Xanax, Norco, and Soma. Elzik's office manager told the social worker Elzik did not prescribe marijuana. Elzik had not known Mother and Father were married to each other until this proceeding began. The office manager said that fact concerned Elzik and had caused him to put both "on detox immediately."

The social worker assigned to the prior dependency case reported the parents' chronic abuse of prescription drugs and alcohol was underlying the prior dependency. Neither parent had a diagnosis of social anxiety during that proceeding; the social worker commented both "are friendly and very sociable people." During the prior dependency proceeding neither parent was authorized to take prescription medicines, and the only time they did was when they had major dental work.

Both parents stated they would participate in services and wanted to reunify with M.K., but the social worker recommended no services be provided. Both parents claimed to be taking prescription drugs for back pain and social anxiety, but neither was using prescription medications during the year of the prior dependency. It appeared to

the social worker that as soon as the prior case was closed, the parents just reverted back to their substance abuse.

In a March 4, 2009, report for the jurisdictional hearing, SSA reported M.K. had been moved from the paternal grandfather's home to the maternal aunt with whom M.K. resided during the prior dependency proceeding. The paternal grandfather had allowed Mother and Father to have an unauthorized overnight visit with M.K. in February. The next day, the maternal aunt and maternal grandmother had come to Mother and Father's home for M.K.'s birthday party, not knowing about the new dependency proceedings. Father stole the maternal aunt's prescription medicines from her car, including a newly filled bottle of prescription pain medication she was taking while undergoing thyroid cancer treatment. When the maternal aunt went looking for Mother and Father, she found they were locked in their room. When they came out, her pills were spilled on the floor. Father admitted he took six of them, but maternal aunt said many more (over a third of the bottle) were gone.

The maternal aunt and maternal grandmother then left and took M.K. and the maternal aunt's own child to a nearby restaurant. Mother and Father showed up and became belligerent and hostile ending with Mother "'head butting'" the maternal aunt. The police were called and would not permit Mother and Father to drive as they appeared intoxicated. The officer permitted the maternal aunt and maternal grandmother to take M.K. home with them. Mother and Father denied the maternal aunt's report of the events.

At the March 4, 2009, jurisdictional hearing Father pleaded no contest to the allegations of the petition and Mother submitted on the reports. The court found the allegations of the petition true and set a contested disposition hearing for April. Mother and Father were allowed visitation with M.K. three times a week.

Dispositional Hearing

The dispositional hearing began on April 8. Mother's counsel advised the court she intended to call as a witness Dr. Wayne Robinson to testify Mother had an active prescription for medical marijuana use. Counsel explained Robinson was not a prescribing doctor at the time of the accident. Rather, he "renewed" Mother's marijuana prescription after the January 10 accident, but "in order to renew the prescription, [Robinson] had to research to ensure that there was an active prescription out." Mother's counsel argued Robinson's testimony was relevant to disprove the section 361.5, subdivision (b)(13), exception to reunification services. County counsel objected it was the first she had heard any mention of Robinson as a witness.

The court stated it doubted Robinson's testimony would be relevant, but it was inclined to take "402 type" initial offer of proof. However, the court agreed with county counsel that if Robinson was going to testify, Mother should bring any and all prescriptions, including her medical marijuana card, to court the next day and sign a release of Robinson's medical records concerning her. Mother's counsel objected such an order would violate Mother's right to privacy in her medical records.

The court ordered if Mother intended to call Robinson to testify, she must execute a full release of her medical records "relating to the issues in the case." It also ordered Mother produce any prescriptions in her possession relating to her receipt of any controlled substances in the past year. Mother and her counsel conferred after which Mother's counsel advised the court she would not be calling Robinson as a witness. The court restated its order regarding other prescriptions. The next day, Mother was able to produce only one prescription dated January 9, 2009.

Social worker Yvette Cole testified she recommended no reunification services be offered because the circumstances that brought M.K. into protective custody less than a year after the prior dependency proceeding terminated were identical to the circumstances of the prior dependency. Cole had confirmed that Elzik had given Mother

prescriptions for Xanax, Vicodin, and Soma. She could not confirm Mother's claim she had a medical marijuana prescription. Mother had been referred to a perinatal program, drug testing, and counseling. Her first drug test was positive for marijuana, opiates, and barbituates. Mother missed other drug tests.

Although Cole thought Mother could reunify with M.K. because she had done so before, she did not believe Mother could thereafter maintain sobriety to raise M.K. to adulthood. Mother had not learned from the prior dependency proceeding. She continued to deny having a substance abuse problem and denied she was under the influence at the time of the accident. M.K. and Mother were having weekly visits that went well.

Counsel stipulated that if called, Mother would invoke her right against self-incrimination and not testify. Father testified Mother did not have a drug problem, and although both got prescriptions from Elzik and Robinson, he denied knowledge Mother was taking any prescription medicines until after the accident.

The court found by clear and convincing evidence Mother and Father had resisted drug treatment and came within section 361.5, subdivision (b)(13). In ruling, the court commented there had been no showing by Mother or Father of any medical need for their prescription medicines—no explanation as to why a psychiatrist was prescribing pain medicine for claimed orthopedic issues—and it was apparent to the court the parents had simply found a provider willing to write prescriptions for them. Although Father had attempted to prove he had a medical marijuana card, he failed to show he suffered from any serious medical condition permitting such a license. The court concluded the parents were continuing to abuse prescription drugs believing so long as it was a prescription drug, it was alright. Accordingly, it found it was not in M.K.'s best interests to provide reunification services to Mother. It approved SSA's visitation plan of monthly visits.

DISCUSSION

1. Privacy Rights

Mother contends the juvenile court's refusal to permit Robinson to testify unless Mother consented to the release of her medical records violated her privacy rights under the state and federal constitutions. We disagree.

Article I, section 1, of the California Constitution does recognize a right to privacy, but to establish a claim that right is violated it must be shown: (1) there is a specific, legally protected privacy interest; (2) there is a *reasonable expectation of privacy*; and (3) the complained of conduct constitutes a serious invasion of privacy. (*Loder v. City of Glendale* (1997) 14 Cal.4th 846, 893-895 (*Loder*); *Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 39-40 (*Hill*).) The court must then balance the claimed right to privacy against any competing governmental interests. (*Loder, supra,* 14 Cal.4th at p. 893.)

Assuming Mother has a protected privacy interest in her medical records, she had no reasonable expectation of privacy in them under the circumstances. Mother claimed she had a valid medical marijuana prescription from Robinson and sought to introduce his testimony to that effect so as to justify her use of marijuana and to provide evidence she had not resisted treatment for substance abuse. When the January 2009 car accident occurred, Mother admitted she had been using marijuana in addition to other prescribed medications but said nothing about having a prescription for marijuana. When Father claimed Mother had a marijuana prescription and the social worker told him Mother had not mentioned having a prescription, Father replied he would get her one. Mother later reported she and Father had marijuana prescriptions but could not find them, and that all their prescriptions were from the same doctor. She apparently authorized release of her medical information from Elzik because the social worker was able to get information from his office confirming he prescribed to Mother the drugs Vicodin, Soma, and Xanax, but Elzik denied he had prescribed marijuana.

At the commencement of the dispositional hearing, Mother claimed she had a medical marijuana prescription from Robinson. The Compassionate Use Act of 1996 allows a physician to recommend use of marijuana for medical purposes to someone who is "seriously ill" if the physician "has determined that the person's health would benefit from the use of marijuana in the treatment of cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or any other illness for which marijuana provides relief." (Health & Saf. Code, § 11362.5, subd. (b)(1)(A).) The court reasonably ordered Mother to release her medical records from Robinson (as they related to the issues in this case) so as to permit SSA to be able to effectively cross-examine Robinson as to whether there was a sound medical basis for such a prescription. Furthermore, as with Mother's use of the prescription medications, the issue was not the legality of the drugs, but whether Mother was *abusing* drugs in such ways as to endanger her child. It was within the court's discretion to order release of information that would bear on that issue. Mother's privacy rights under the California Constitution were not impinged upon by the discovery order. And given that the United States Constitution is less protective of privacy than the California Constitution (*American Academy of Pediatrics v. Lungren* (1997) 16 Cal.4th 307, 326-327), Mother has failed to show the discovery order ran afoul of the federal Constitution as well.

2. Section 361.5, Subdivision (b)(13) Finding

Mother contends the court erred by denying her reunification services under section 361.5, subdivision (b)(13), because there is insufficient evidence she resisted drug treatment. We disagree.

Section 361.5, subdivision (b)(13), provides reunification services need not be provided when the court finds by clear and convincing evidence a parent "has a history of extensive, abusive, and chronic use of drugs or alcohol and has resisted prior court-ordered treatment for this problem during a three-year period immediately prior to the filing of the petition that brought that child to the court's attention, or has failed or

refused to comply with a program of drug or alcohol treatment described in the case plan . . . on at least two prior occasions, even though the programs identified were available and accessible." The statute reflects "a legislative determination that an attempt to facilitate reunification between a parent and child generally is not in the minor's best interests when the parent is shown to be a chronic abuser of drugs who has resisted prior treatment for drug abuse. [Citation.]" (*In re Levi U.* (2000) 78 Cal.App.4th 191, 200.)

We review the juvenile court's order denying reunification services for substantial evidence. (*Cheryl P. v. Superior Court* (2006) 139 Cal.App.4th 87, 96.) If, on the entire record, there is substantial evidence to support the findings of the juvenile court, we uphold those findings. We do not consider the credibility of witnesses, attempt to resolve conflicts in the evidence or evaluate the weight of the evidence. Instead, we draw all reasonable inferences in support of the findings, view the record favorably to the juvenile court's order, and affirm the order even if there is substantial evidence supporting a contrary finding. The parent has the burden of showing there is no evidence of a sufficiently substantial nature to support the finding or order. (*In re L. Y. L.* (2002) 101 Cal.App.4th 942, 947.)

A juvenile court may find a parent has resisted prior court-ordered treatment when the parent refuses to participate in a treatment program or when the parent attends a program but continues to abuse drugs or alcohol. As explained in *Karen S. v. Superior Court* (1999) 69 Cal.App.4th 1006, 1010, "parent[s] . . . can passively resist by participating in treatment but nonetheless continuing to abuse drugs and alcohol, thus demonstrating an inability to use skills and behaviors taught in the program to maintain a sober life." As a result of resisting treatment, the parent has demonstrated that reunification services "would be a fruitless attempt to protect the child because the parent's past failure to benefit from treatment indicates that future treatment also would fail to change the parent's destructive behavior." (*Ibid.*)

It was not unreasonable for the juvenile court to find Mother has resisted prior court-ordered treatment for her drug abuse within the meaning of section 361.5, subdivision (b)(13), and substantial evidence supports denying services. Mother has a significant history of substance abuse, dating to her teenage years, which included use of methamphetamine, cocaine, marijuana, alcohol, abusing numerous prescription drugs, and arrests for driving under the influence. M.K. was the subject of a prior dependency proceeding due to the exact same circumstances, i.e., Mother's abuse of prescription medicines, marijuana, and driving under the influence. After voluntary family maintenance services were unsuccessful, M.K. was removed from Mother's custody in September 2006. Mother then participated in services for over 18 months, completing a court-ordered drug program and perinatal program, and reunified with M.K. in March 2008. But less than a year later, Mother was engaging in the exact same behavior. She was abusing prescription medication and marijuana. She drove a car while under the influence, with M.K. in the backseat, and got in a serious accident. The gist of Mother's argument is that because she had prescriptions for the drugs she was using, she cannot be said to have resisted drug treatment. But the juvenile court found the lack of credible evidence Mother had any medical need for the prescription drugs indicated she had simply been successful in finding providers to write prescriptions for her. And as noted above, the *legality* of her possession and use of the substances is not at issue. At issue is whether her chronic abuse of the drugs has left her unable to protect her child and whether she has resisted treatment for that abuse. The record supports the court's affirmative finding in that regard.

3. Section 361.5, Subdivision (c) Finding

Mother contends the juvenile court erred by failing to find under section 361.5, subdivision (c), that reunification services would be in M.K.'s best interest. We disagree.

Because the juvenile court found Mother fell within the section 361.5, subdivision (b)(13), exception to reunification services, it could not order services unless it found, by clear and convincing evidence, reunification was in the best interests of the child. (§ 361.5, subd. (c).) "'"[O]nce it is determined one of the situations outlined in subdivision (b), applies, the general rule favoring reunification is replaced by a legislative assumption that offering services would be an unwise use of governmental resources. [Citation.]"' [Citation.] The burden is on the parent to change that assumption and show that reunification would serve the best interests of the child." (*In re William B.* (2008) 163 Cal.App.4th 1220, 1227 (*William B.*).) We will not disturb the court's finding unless an abuse of discretion is shown. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318 (*Stephanie M.*).)

Mother has not demonstrated an abuse of discretion. Despite the prior dependency proceeding, and her successful completion of services, Mother quickly returned to substance abuse and endangered M.K.'s life as a result. Furthermore, the court reasonably concluded, it was not a mere opportunistic relapse Mother suffered—she affirmatively sought out prescriptions for drugs she could continue to abuse. Given Mother's history, the court saw little hope services would be successful in the end—even if Mother completed them, the risk of a relapse was too high. Mother points to her good relationship and positive visitation with M.K. in arguing services should have been provided. But M.K.'s "bonds with [M]other cannot be the sole basis for a best interest finding. . . . The best interests of the child are not served by merely postponing his chance for stability and continuity and subjecting him to another failed placement with the parent." (*William B., supra*, 163 Cal.App.4th at p. 1229.) M.K. was an infant when the first dependency proceeding began, and resided out of Mother's custody for over a year. He was not even three years old when taken into protective custody a second time. Given his young age, the court could reasonably conclude M.K.'s best interests were not served by postponing stability.

4. Visitation

Mother contends the juvenile court erred by reducing her visits with M.K. from three times a week to once a month as being without "legal justification." We find no error.

When reunification services are denied, the juvenile court "may continue to permit the parent to visit the child unless it finds that visitation would be detrimental to the child." (§ 361.5, subd. (f).) "[V]isitation is not integral to the overall plan when the parent is not participating in the reunification efforts. This reality is reflected in the permissive language of section 361.5, subdivision (f)." (*In re J.N.* (2006) 138 Cal.App.4th 450, 458-459, fn. omitted.) We review a visitation order made in a dependency proceeding for abuse of discretion and will not disturb the juvenile court's decision unless an abuse of discretion clearly is shown. (*Stephanie M., supra,* 7 Cal.4th at pp. 318-319.)

We cannot say the visitation order constitutes an abuse of discretion. Although Mother's visits with M.K. went well, in denying services the juvenile determined M.K. needed placement in a stable and permanent home and a reduction in visits would assist in achieving permanency. The juvenile court reasonably adopted SSA's recommendation of maintaining some visits to ease the transition, but we cannot say the reduction constituted an abuse of discretion.

DISPOSITION

The petition is denied.

O'LEARY, ACTING P. J.

WE CONCUR:

MOORE, J.

IKOLA, J.